STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
July 13, 2010

In the Matter of C.R. KENNEDY, Minor.

No. 295411
Oakland Circuit Court
Family Division
LC No. 08-742681-NA

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

Respondent Sherry Clayton appeals as of right from the trial court's terminating her parental rights to her minor child under MCL 712A.19b(3)(c)(*i*), (g), and (j). We affirm.

"In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b . . . has been met by clear and convincing evidence." *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). Once the petitioner has established a statutory ground for termination by clear and convincing evidence, and the court finds that termination is in the best interest of the child, the trial court must order termination of parental rights. MCL 712A.19b(5); *In re Trejo Minors*, 462 Mich 341, 354, 612 NW2d 407 (2000).

The trial court's decision, including the best interest determination, is reviewed under the clearly erroneous standard. MCR 3.977(J); *In re Rood*, 483 Mich 73, 90-91; 763 NW2d 587 (Opinion by CORRIGAN, J.). "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Rood*, 483 Mich at 91 (Opinion by CORRIGAN, J.), quoting *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). To be clearly erroneous, a decision must be more than maybe or probably wrong. *In re Sours Minors*, 459 Mich 624, 633; 593 NW2d 520 (1999). In applying the clearly erroneous standard, this Court should recognize the special opportunity the trial court has to assess the credibility of the witnesses. *Miller*, 433 Mich at 337, citing MCR 2.613(C).

The trial court did not clearly err in holding that the statutory grounds for termination of respondent's parental rights were established by clear and convincing evidence or in determining that termination of respondent's parental rights was in the child's best interests. The minor child, who is profoundly deaf, was taken into the temporary custody of the court when she was seven years old. The petition alleged that respondent had been neglecting C.R. by depriving her of

proper food, rest, and medical care, and by keeping a cat and a filthy house when C.R. suffers from asthma. The petition further alleged that, because respondent was unable to communicate with her daughter through sign language, C.R. was far behind in school and regressing further. Upon her removal, C.R. was placed with a deaf foster mother who, along with her husband, was proficient in American Sign Language. C.R. immediately began to thrive physically, academically, and socially. Respondent's parental rights were terminated almost two years later after she had received and completed individual and family therapy, a parenting class, and two sign language classes (but failed to complete a third) with no improvement in her ability to communicate in sign language or in her parenting skills.

Respondent does not deny that the evidence established all three statutory grounds, but argues that petitioner did not make reasonable efforts to help her learn sign language by providing her with one-to-one instruction, because she has a learning disability, and that termination was not in the child's best interests. We disagree.

Under most circumstances, including those present here, the statute requires the state to make "[r]easonable efforts to reunify the child and family." *Rood*, 483 Mich at 99-100 (Opinion by CORRIGAN, J.), quoting MCL 712A.19a(2). The adequacy of the state's attempts to provide services "may bear on whether there is sufficient evidence to terminate a parent's rights." *Id.* at 89. This is true because, if the state does not provide adequate services to a parent, the trial court may lack the evidence by which to decide whether the parent, if provided with appropriate services, would have been able to rectify the conditions that led to adjudication, or to provide proper care and custody, within a reasonable time considering the child's age. *Id.* at 115-118.

The state's efforts were reasonable in this case. Respondent had ample opportunity to demonstrate her ability and willingness to parent, as the state provided many services in an effort to facilitate reunification. The trial court had no need to resort to conjecture about whether respondent would be able to rectify her former neglect of her daughter and provide C.R. with proper care and custody within a reasonable time. See *id.* at 89. To the contrary, substantial, clear and convincing evidence established that petitioner provided respondent with many services, including a psychological evaluation, three sign language classes, a parenting class, individual therapy, family therapy, and extensive job counseling. She completed all services except the third sign language course, and the evidence clearly established that she failed to benefit from any of them. She did not obtain a job, her ability to communicate in sign language actually declined, and she continued to parent her daughter in exactly the same dysfunctional way as before, despite specific coaching from her foster care worker and family therapist.

A parent must not only physically comply with conditions required by the court but must also benefit from the services such that he or she can provide a safe, nurturing home for the minor child. *In re Gazella*, 264 Mich App 668, 676; 692 NW2d 708 (2005), superseded by statute on other grounds *In re Hansen*, 285 Mich App 158, 163; 774 NW2d 698 (2009). The statutory requirement that the state make reasonable efforts toward reunification does not include actions that would clearly be futile. See *In re LE*, 278 Mich App 1, 21; 747 NW2d 883 (2008), citing MCL 712A.18f(1)(b) (agency may explain why services were not provided); *In re Fried*, 266 Mich App 535, 542; 702 NW2d 192 (2005) (noting that the worker's decision not to refer the respondent to counseling was not unreasonable because his psychological evaluation indicated that it would be unproductive until he addressed his drug addiction).

Respondent did not comply with the sign language class requirement, and she failed to benefit from those classes she did take, as well as from the job counseling, parenting classes, and extensive individual and family therapy. Respondent did not complete the third sign language class because she found it too difficult, and because she had to walk over a mile from the bus stop to the school. However, respondent was tested in order to determine the best class for her based on her current ability, and there were no existing additional transportation services that would have taken her to the school's doorstep. The evidence suggests that respondent was physically able to walk the distance, and she had no time constraint, as she was neither working nor caring for her daughter at the time.

Respondent argues that the third sign language class was not appropriate for her because of her learning disability. But petitioner did not seek out special sign language classes for respondent because her initial psychological evaluation indicated that she was not mentally deficient or cognitively impaired. When the family therapist suggested that respondent be evaluated to determine whether she had a learning disability, petitioner referred her to Easter Seals, but she missed three appointments in a row and only completed the evaluation after the first day of the termination hearing, when reunification was no longer the goal and services were no longer required. In any case, uncontroverted evidence established that people who, like respondent, have difficulty with reading and spelling can become fluent in sign language without specialized instruction. Evidence also established that respondent had one-to-one instruction with the family therapist throughout the approximately five months of therapy, and she did not retain the signs any better than she had after sign language classes.

Even if petitioner's efforts regarding sign language instruction were not reasonable, termination would still be appropriate in this case. Respondent's entire argument is based on the premise that her inability to learn sign language was the sole reason that there was no bond whatsoever between C.R. and her. This premise is not supported by the evidence. Respondent did not need sign language to know that her daughter needed proper food, sleep, cleanliness, medical attention, as well as the ability to communicate with her mother and others. Yet C.R. was removed because respondent failed to provide properly for even C.R.'s most basic needs, despite having received extensive services from the time C.R. was born. Respondent's home was filthy and cluttered, and she kept a cat despite C.R.'s asthma. The bus driver had to wake respondent so she could get C.R. ready for school. C.R. went to school hungry and tried to take food home from school. She went to school and doctors' appointments dirty and without her glasses or hearing aid. Instead of working to teach herself and C.R. how to communicate, respondent treated C.R. like a baby that she could pick up and cuddle and play with, but not communicate with except by pointing. Respondent refused to attend sign language classes for seven years, despite repeated urging from medical and educational professionals, until the state forced her to by removing C.R. from her custody.

Before respondent began her parenting class, the providers evaluated her parenting ability. The evaluation conducted before she began the parenting class showed that, of the five characteristics needed for effective parenting, respondent lacked one -- the ability to empathize with her child. While testimony indicated that respondent loved C.R. to the best of her ability, the evidence also established that her lack of empathy rendered her unable to recognize C.R.'s needs -- or even to realize the fact that C.R. could not understand respondent when she tried to sign. Respondent's lack of empathy made her oblivious to the trauma that C.R. would suffer if

she followed her plan to remove C.R. from her school and her tight-knit deaf community, where she had been for two-thirds of her life, and transfer her to a state-run boarding school in Flint, where C.R. knew no one and would only see respondent on weekends.

Respondent attended the parenting class, participated actively, and completed the class, and she was coached by C.R.'s foster care worker and the family therapist, but she did not change the dysfunctional way in which she interacted with C.R. She continued to treat her child in an age-inappropriate manner despite C.R.'s adamant demands that she stop, and despite being repeatedly advised to stop by both the caseworker and the family therapist. The therapist testified that, at times, respondent forgot C.R. was even in the room, and that there was no bond whatsoever between mother and daughter. Throughout the pendency of this case, C.R. became extremely upset when she had to visit respondent and almost hysterical at the prospect that the court might place her back in respondent's custody. She was sleepwalking and having nightmares, and she eventually refused even to look at respondent. The trial court did not clearly err in finding that petitioner made reasonable efforts at reunification and that statutory grounds for termination had been established.

Respondent also argues that petitioner failed to comply with the Americans with Disabilities Act (ADA)[1] because petitioner did not provide her with specialized sign language instruction to overcome her reading and spelling disabilities. We disagree. Through no fault of petitioner, respondent's learning disability was not diagnosed until after the termination hearing had begun, when services were no longer being provided. Further, respondent waived her ADA argument by not raising it in the trial court. *In re Terry*, 240 Mich App 14, 26; 610 NW2d 563 (2000). A parent who fails to timely raise the ADA issue may still bring a separate action pursuant to the ADA. *Id.* Whether a parent brings a separate ADA action or not, "[a]t the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA." *Id.*

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). See also *Hansen*, 285 Mich App at 164. Determination of the child's best interest can be based on evidence introduced by any party, or it can be based on the record as a whole. *Trejo*, 462 Mich at 353. C.R. was severely neglected by respondent, had no bond with her, and the evidence clearly established that respondent failed to benefit from the many services that were provided. C.R. was thriving in her foster home, and her foster parents wished to adopt her. The trial court did not clearly err in holding that termination of respondent's parental rights was in C.R.'s best interests.

[1] 42 USC 12101 *et seq.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens